

it may
x

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

APR 28 2006

CLERK, U.S. DISTRICT COURT

By Deputy

CERVANDO S. ESTRELLO,

Petitioner,

v.

**DOUGLAS DRETKE, Director
Texas Department of Criminal Justice,
Correctional Institutions Division,**

Respondent.

§
§
§
§
§
§
§
§
§
§
§

Civil Action No. 3:04-CV-1035-L

ORDER

This is a habeas case brought under 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(b), and an order of the court in implementation thereof, this action was referred to the United States magistrate judge for proposed findings and recommendation. On March 27, 2006, the Findings, Conclusions and Recommendation of the United States Magistrate Judge ("Report") were filed. Petitioner filed Petitioner's Objections to the Magistrate's Findings, Conclusions, and Recommendation ("Objections") on April 7, 2006.

On May 18, 1999, Petitioner was convicted of two cases of aggravated assault on a public servant and one case of possession of a controlled substance (cocaine). Petitioner's convictions were enhanced with a prior conviction. He was sentenced to 50 years confinement on each offense, to run concurrently. His convictions were affirmed on direct appeal. On April 26, 2002, Petitioner filed state applications for writs of habeas corpus challenging each of his convictions. On September 11, 2002, the Court of Criminal Appeals granted Petitioner the right to file an out-of-time petition for discretionary review. The Court of Criminal Appeals denied the petition on January 22, 2003. On

October 1, 2003, Petitioner filed his second application for state habeas relief, which was also denied by the court of Criminal Appeals on January 21, 2004.

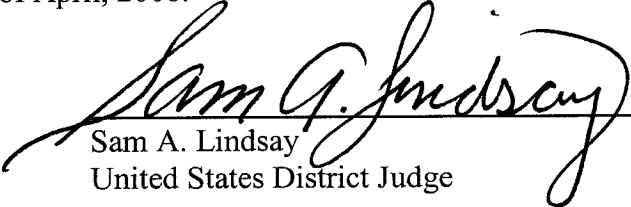
Petitioner filed this federal petition for writ on habeas corpus on May 8, 2004. He contends that: (1) he received ineffective assistance of counsel; (2) the state suppressed evidence; (3) he is innocent; and (4) the state presented false evidence.

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) establishes a one-year statute of limitations for federal habeas proceedings. *See* 28 U.S.C. § 2244(d)(1)(A). The magistrate judge found that Petitioner’s conviction became final on December 29, 2000, and he had until December 29, 2001, to file his federal petition. The magistrate judge also found that Petitioner’s state applications for writ of habeas corpus did not toll the limitations period, as they were filed after the one-year limitations period had expired. The magistrate judge determined that Petitioner’s claim of newly discovered evidence is unfounded, as his defense counsel was provided the evidence prior to trial. The magistrate judge also concluded that Petitioner has not shown rare and exceptional circumstances that would justify equitable tolling in this case. The magistrate judge recommends that the petition for a writ of habeas corpus be dismissed with prejudice as barred by the one-year limitations period.

Petitioner objects to the Report, contending that equitable tolling applies to his petition. He maintains that he discovered new evidence in 2002 regarding his criminal case. Specifically, a police investigation file that he claims the trial judge prevented him from acquiring. He maintains that the file contained undisclosed sworn statements of police officers that contradicted the testimony of other officers that testified at his criminal trial.

After making an independent review of the pleadings, file and record in this case, the findings of the magistrate judge, and having considered Petitioner's objection thereto, the court determines that the findings and conclusions of the magistrate judge are correct. They are therefore accepted as those of the court. Accordingly, the court **overrules** Petitioner's Objections to the Magistrate's Findings, Conclusions and Recommendations; **denies** Petitioner's petition for the writ of habeas corpus; and **dismisses this action with prejudice** as time-barred.

It is so ordered this 28th day of April, 2006.


Sam A. Lindsay
United States District Judge